Supreme Court, U. S.
FILED
JUL 27 1978
MICHAEL RODAK, JR., CLERK

# Supreme Court of the United States

October Term, 1978

No. 78-152

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
*Petitioner,*

vs.

NED E. WILLIAMS, DIRECTOR
OHIO ENVIRONMENTAL PROTECTION AGENCY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
**To the Ohio Supreme Court**

GUREN, MERRITT, SOGG & COHEN
650 Terminal Tower
Cleveland, Ohio 44113

By: MICHAEL L. HARDY
DAVID A. SCHAEFER

and

DONALD H. HAUSER, *General Attorney*
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
P. O. Box 5000
Cleveland, Ohio 44101
*Counsel for Petitioner*

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-0667

## TABLE OF CONTENTS


Table of Authorities ..... II
Opinions Below ..... 1
Jurisdiction ..... 2
Questions Presented ..... 2
Constitutional and Statutory Provisions Involved ..... 2
Statement of Facts ..... 3
Reasons for Granting the Writ ..... 11

1. The Decisions of the Ohio Supreme Court and the Franklin County Court of Appeals Conflict With Decisions of This Court and the Sixth Circuit Court of Appeals Since They Effectively Have Denied Petitioner the Opportunity to Challenge Air Pollution Regulations Applicable to It 11
2. The Decisions Below Deny Petitioner Its Constitutional Right to Procedural Due Process of Law 16

Conclusion ..... 19
Appendix (Printed under separate cover):

A. Decision of the Ohio Supreme Court Denying Petitioner's Motion for Rehearing ..... A1
B. Decision of the Ohio Supreme Court Dismissing Petitioner's Appeal and Denying Its Motion to Certify ..... A2
C. Decision of the Franklin County Court of Appeals ..... A4
D. Decision of the Ohio Environmental Board of Review ..... A23
E. Final Findings and Orders of the Director of the Ohio Environmental Protection Agency ..... A101

F. Findings of Fact and Conclusions of Law of the Hearing Panel of the Ohio Environmental Protection Agency ..... A138
G. Pertinent Constitutional, Statutory, and Regulatory Provisions ..... A154

## TABLE OF AUTHORITIES

### Cases

*Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967) .... 18
*Armco Steel*, 73-AV-164 (1974) ..... 19
*Buckeye Power, Inc. et al. v. EPA*, 481 F.2d 162 (6th Cir. 1973) ..... 5, 9, 11, 14
*Buckeye Power, Inc. et al. v. EPA*, 525 F.2d 80 (1975) ..... 12, 14
*Burger Brewing Co. v. Liquor Control Commission*, 34 Ohio St. 2d 93 (1973) ..... 18
*Fortner v. Thomas*, 22 Ohio St. 2d 13 (1970) ..... 13
*Getty Oil Company v. Ruckelshaus*, 467 F.2d 349 (3rd Cir. 1972) ..... 18
*Goldberg v. Kelly*, 397 U.S. 254 (1970) ..... 18
*Natural Resources Defense Council, Inc. v. EPA*, 478 F.2d 875 (1st Cir. 1973) ..... 15
*Natural Resources Defense Council, Inc. v. EPA*, 494 F.2d 519 (2d Cir. 1974) ..... 15
*Natural Resources Defense Council, Inc. v. EPA*, 489 F.2d 390 (5th Cir. 1974) ..... 15
*Natural Resources Defense Council, Inc. v. EPA*, 483 F.2d 690 (8th Cir. 1973) ..... 15
*Ormet Corporation*, 73-AV-119 (1974) ..... 19
*Rankin-Thomas v. Caldwell*, 42 Ohio St. 2d 436 (1975) 13
*Raper v. Lucy*, 488 F.2d 749 (1st Cir. 1973) ..... 18
*Rheingans v. Clark*, 314 F. Supp. 1398 (N.D. Cal. 1968) 18



*State ex rel. Foster v. Evatt*, 144 Ohio St. 65 (1944) .... 15
*State ex rel. Williams, Director v. Bozarth, Judge*, 55 Ohio St. 2d 34 (1978) ..... 7, 18
*Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975) ..... 12, 15, 16, 19
*Tumey v. State of Ohio*, 273 U.S. 510 (1927) ..... 11
*Union Electric Company v. EPA*, 427 U.S. 246, 96 S. Ct. 2518 (1976) ..... 12, 14, 16, 19
*Yakus v. United States*, 321 U.S. 414 (1944) ..... 17, 18

### Constitutional Provisions, Statutes, and Regulations

United States Constitution, Amendment XIV, Section One ..... 2, 16
5 U.S.C. §500 *et seq.* ..... 11
42 U.S.C. §7401 *et seq.* ..... 4
42 U.S.C. §7410 ..... 2, 5, 16
42 U.S.C. §7607(b)(1) ..... 11
40 C.F.R. §52.1881(b)(23)(iv) ..... 9
40 C.F.R. §50.4 *et seq.* ..... 4
10 C.F.R. §215.3 ..... 7
Ohio Revised Code, Chapter 119 ..... 2, 5, 6, 7, 13, 14
Ohio Revised Code, Chapter 3745 ..... 13
Ohio Revised Code, Section 3704.03(D) ..... 2, 4
Ohio Revised Code, Section 3704.03(E) ..... 3, 4
Ohio Revised Code, Section 3704.03(H) ..... 3, 14
Ohio Revised Code, Section 3745.04 ..... 3, 7, 14
Ohio Revised Code, Section 3745.06 ..... 3, 7, 8
Georgia Code Annotated Section 88-912 ..... 15

### Miscellaneous

OAC3745-17-02, AP-3-02 ..... 3, 4
OAC3745-17-10, AP-3-11 ..... 3, 4

OAC3745-17-13, AP-3-14 ..... 3, 4
OAC3745-35-03, EP-32-03 ..... 3, 4, 9, 14
DAVIS, ADMINISTRATIVE LAW, (3rd ed. 1972) ..... 17

# Supreme Court of the United States

**October Term, 1978**

**No. .....**

THE CLEVELAND ELECTRIC ILLUMINATING COMPANY,
*Petitioner,*

vs.

NED E. WILLIAMS, DIRECTOR
OHIO ENVIRONMENTAL PROTECTION AGENCY,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI
**To the Ohio Supreme Court**

Petitioner, The Cleveland Electric Illuminating Company, respectfully prays that a writ of certiorari issue to review the decisions of the Ohio Supreme Court entered in this proceeding on May 5, 1978, denying Petitioner's Motion for Rehearing and April 7, 1978, overruling Petitioner's Motion to Certify and dismissing Petitioner's appeal from the judgment of the Franklin County Court of Appeals rendered on December 8, 1977.

## OPINIONS BELOW

The orders of the Ohio Supreme Court and the opinion of the Franklin County Court of Appeals, not yet reported, appear in Appendices A, B, and C, respectively. The opinions of the Ohio Environmental Board of Review, the Director of the Ohio Environmental Protection Agency,

and the Findings of Fact and Conclusions of Law of the Hearing Panel of the Ohio Environmental Protection Agency appear in Appendices D, E, and F, respectively.

## JURISDICTION

The order of the Ohio Supreme Court denying Petitioner's Motion for Rehearing was entered on May 5, 1978. This petition for certiorari was filed within 90 days of that date in accordance with 28 U.S.C. Section 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. Section 1257(3).

## QUESTIONS PRESENTED

1. Whether the decisions below conflict with principles of federal law established in decisions by this Court and the Sixth Circuit Court of Appeals.

2. Whether Petitioner was denied procedural due process guaranteed to it by the Fourteenth Amendment to the United States Constitution since Petitioner was not permitted to challenge certain regulations promulgated by Respondent having a substantial adverse effect on Petitioner.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. U.S. Constitution, Amendment XIV
2. 42 U.S.C. Section 7410 (Supp. 1977)
3. Ohio Revised Code, Chapter 119
4. Ohio Revised Code, Section 3704.03(D) (Pages 1971)



5. Ohio Revised Code, Section 3704.03(E) (Pages 1971)
6. Ohio Revised Code, Section 3704.03(H) (Pages 1971)
7. Ohio Revised Code, Section 3745.04 (Pages 1971)
8. Ohio Revised Code, Section 3745.06 (Pages 1971)
9. Ohio Administrative Code 3745-17-02, AP-3-02
10. Ohio Administrative Code 3745-17-10, AP-3-11
11. Ohio Administrative Code 3745-17-13, AP-3-14
12. Ohio Administrative Code 3745-35-03, EP-32-03

Pertinent provisions of all of the above are excerpted in Appendix G.

## STATEMENT OF FACTS

In January, 1972, Ohio commenced its present program for air pollution control. At that time, the Ohio Air Pollution Control Board adopted a series of regulations for the control of various air pollutants. Among the regulations promulgated were ambient standards, emission limitations, and variances from the emission limitations.[1]

The ambient standards established the goals for the quality of the air in Ohio. These standards were stated

---

1. These regulations were originally codified as AP-3-02 (ambient standards), AP-3-11 and AP-3-14 (emission limitations), and AP-9-04 (variances). Subsequently AP-9-04 was restated as EP-32-03. On January 1, 1977, all of these regulations were renumbered as a part of the official citation system imposed by the Ohio General Assembly in Am. Sub. H.B. 317 (1976). Thus, AP-3-02 is now designated as OAC3745-17-02; AP-3-11, OAC3745-17-10; AP-3-14, OAC3745-17-13; and EP-32-03, OAC 3745-35-03. Citations in this Memorandum will be to the OAC numbers. Parallel citations to the former numbers are provided in the Table of Authorities.

in terms of the permissible amount of a given pollutant in the ambient air. [See Section 3704.03(D), Ohio Revised Code, and Ohio Administrative Code ("OAC") 3745-17-02, Appendix G, *infra.*] Ohio's standards called for ambient levels *below* those required by federal law.[2]

In order to attain these stringent ambient air quality standards, the Air Pollution Control Board developed a second set of regulations. These regulations—called emission limitations—imposed limitations on the levels of pollutants each source could emit. In developing these regulations, the Air Pollution Control Board incorporated extremely restrictive assumptions.[3] As a general rule, these emission limitations required each source in Ohio to reduce the amount of its emissions from then existing levels. [See Section 3704.03(E), Ohio Revised Code and OAC 3745-17-10, -13, Appendix G, *infra.*] These emission limitations required instantaneous compliance. If a source found immediate compliance impossible to achieve (which was the common situation), it could apply for a variance from the emission limitations. The variance could delay the time for achievement of the emission limitation for up to three years. [OAC3745-35-03, Appendix G, *infra.*]

2. Clean Air Act, 42 U.S.C. §7401 et seq. In 40 C.F.R. §50.4 et seq., the United States Environmental Protection Agency ("USEPA") prescribed ambient air quality standards for sulfur dioxide, and in 40 C.F.R. §50.6 et seq., USEPA established comparable standards for particulate matter. Ohio's annual average standard for sulfur dioxide, for example, was 60 micrograms per cubic meter compared to the 80 micrograms per cubic meter criterion provided for in 40 C.F.R. §50.4(a).

3. In developing the emission limitations, the Air Pollution Control Board employed a relatively crude "worst spot" approach. That is, the Air Pollution Control Board found the area in the state with the highest concentrations of a given pollutant, and determined the reductions in emissions necessary to achieve the desired ambient level at that spot. The resulting prescribed level of reductions was incorporated into the emissions standards for all sources in the state, even for those sources having little or no impact on the "worst spot".



These and other regulations were submitted to the USEPA as a part of the Ohio Implementation Plan in accordance with Section 110(a) of the Clean Air Act of 1970, 42 U.S.C. §1857c-5 (1977).[4] USEPA approved the Plan in May, 1972, but the Sixth Circuit Court of Appeals vacated that approval on June 18, 1973, in *Buckeye Power, Inc. et al. v. EPA*, 481 F.2d 162 (6th Cir. 1973) ["*Buckeye I*"].

By the time of the Sixth Circuit's action, Petitioner had applied for variances from the emission limitations applicable to its plants.[5] The variance applications contained requests for relief from the applicable emission limitations on the grounds, *inter alia*, that the full reduction in emissions prescribed by the applicable emission limitations was more than necessary to attain the ambient air quality standards in the vicinity of Petitioner's plants and therefore would lead to unjustified costs of compliance.

In May, 1973, the Director of the Ohio EPA proposed variances which disregarded Petitioner's requested relief. The Director's proposed variances would have required Petitioner to achieve in three years the full reductions in emissions prescribed by the emission limitations.

Believing that the emission limitations were unnecessary to attain ambient standards in the vicinity of its plants, Petitioner requested adjudication hearings pursuant to Chapter 119 of the Ohio Revised Code (Appendix G,

4. As a result of the Clean Air Act Amendments of 1977, this section has been renumbered to 42 U.S.C. §7410 (Supp. 1977) (see Appendix G, *infra*).

5. After these applications were submitted to the Ohio Air Pollution Control Board, the Ohio General Assembly abolished the Board and created the Ohio Environmental Protection Agency ("Ohio EPA") to replace the Board and also created the Office of the Director ("Director") to head the new agency. As a result, the variance applications were transferred to the Director for consideration.

*infra*). In its requests, Petitioner stated that it intended to challenge the illegality and unreasonableness of the Director's variances, as applied to Petitioner's facilities, because the variances incorporated the unnecessarily stringent emission limitations. Early in 1974, Petitioner's request for adjudication hearings was consolidated with those of other Ohio electric utilities. On March 4, 1974, the adjudication hearings commenced as consolidated proceedings (In The Matter of Consolidated Electric Utility Hearings, Case No. 73-AP-120 et al.).

A three member Hearing Panel presided over these proceedings. After analyzing nearly 7,000 pages of testimony and many technical exhibits, the Hearing Panel, in September, 1974, issued a 417 page report with recommendations (The Findings of Fact and Conclusions of Law of the Hearing Panel are attached as Appendix F, *infra*). The Hearing Panel essentially agreed with Petitioner's (and the other utilities') challenges. The Hearing Panel concluded that Ohio's ambient air quality standards and emission limitations were not necessary to meet the requirements of federal and state law and, therefore, urged the Director to embark on new rule-making (in accordance with Chapter 119 of the Ohio Revised Code) in order to develop regulations which would not be subject to the many defects found in the original regulations. Until this rule-making was completed, the Hearing Panel ruled, the Director should not require compliance with the defective emission limitations.

On December 12, 1974, the Director rendered his opinion and final order (See Appendix E, *infra*). The Director stated that he considered the Hearing Panel's recommendations for new rule-making to be "advisory" only. Accordingly, the Director did not agree to institute proper proceedings to repeal the existing rules in favor of new rules,



and he did not accept the recommendation to stay the applicability of the emission limitations pending completion of the rule-making. He further ruled that the Hearing Panel should not have entertained challenges to the particulate and sulfur dioxide standards in adjudication hearings conducted pursuant to Chapter 119 of the Ohio Revised Code (Appendix E, A116, *infra*).

The Director did concur, however, with the Hearing Panel's finding that it was not necessary to reduce sulfur dioxide emissions to the level prescribed by the emission limitations. Therefore, his order stated that Petitioner and the other electric utilities would not be required to comply with the emission limitations for sulfur dioxide. The Director, however, ordered Petitioner and the other electric utilities to comply with the particulate emission limitations by April 15, 1977.

Unable to comply at one of its six facilities (its Lake Shore Plant) with the portion of the Director's order mandating compliance with the particulate regulations, Petitioner appealed to the Ohio Environmental Board of Review ("EBR") in January, 1975.[6] Petitioner questioned the Director's ruling that an adjudication hearing was not a proper forum to entertain a challenge to the particulate and sulfur dioxide regulations. In addition, Petitioner cited the 1973 oil embargo and certain federal regulations[7]

---

6. The EBR was created on October 23, 1972, as the forum having the exclusive and original jurisdiction over appeals from the actions of the Director. Sections 3745.04, 3745.06 Ohio Revised Code, Appendix G, *infra*. That the EBR has exclusive jurisdiction was recently reaffirmed in *State, ex rel. Williams v. Bozarth, Judge*, 55 Ohio St. 2d 34 (1978).

7. 10 C.F.R. §215.3(a) (1975), since rescinded, was originally promulgated by the Federal Energy Administration in response to the oil embargo. It prohibited the combustion of petroleum products as primary boiler fuel after December 7, 1973, in any major fuel burning installation which had not burned such fuel on December 7, 1973. The regulation was promulgated after Petitioner had spent nearly $7,000,000 on its oil conversion project, but before Petitioner was able to commence use of oil fuel.

as the chief reasons for its inability to complete its $11,000,000 oil conversion program in time to meet the April 15, 1977, compliance date applicable to the Lake Shore Plant. This oil conversion program was described in detail in Petitioner's variance applications as Petitioner's proposed plans for compliance with particulate regulations at four boilers at its Lake Shore Plant.

At the same time, the Northern Ohio Lung Association ("NOLA") also appealed to the EBR.[8] NOLA contended that the Director erred in not requiring compliance with the sulfur dioxide emission limitations.

In October, 1976, the EBR rendered its decision. The EBR reversed the Director for his failure to order Petitioner to comply with the sulfur dioxide emission limitations, and upheld the Director's order requiring compliance with the particulate emission limitations by April 15, 1977, together with his ruling that the particulate and sulfur dioxide regulations were beyond attack in an adjudication hearing. The EBR ordered Petitioner to comply with the sulfur dioxide emission limitations by November, 1979.

Both Petitioner and NOLA appealed to the Franklin County Court of Appeals.[9] NOLA requested that Court to reverse the EBR's order setting November, 1979, as the compliance date for the sulfur dioxide limitations. Petitioner specified six assignments of error, which principally focused on the orders requiring compliance with the sulfur dioxide and particulate emission limitations. Petitioner further assigned as errors the rulings by the EBR that Ohio's particulate and sulfur dioxide standards were beyond challenge and that variance regulation, OAC3745-35-03, was proper.

8. NOLA previously had intervened in the adjudication proceedings with respect to Petitioner's Lake Shore Plant.

9. By reason of Section 3745.06, Ohio Revised Code (Appendix G, *infra*), the Franklin County Court of Appeals has exclusive and original jurisdiction over appeals from the EBR.



On December 8, 1977, the Franklin County Court of Appeals sustained three of Petitioner's assignments of error and reversed the EBR with respect thereto. It also ruled, however, that the Director should have required compliance with the sulfur dioxide and particulate emission limitations by no later than April 15, 1977, and agreed with the EBR that the particulate and sulfur dioxide regulations were beyond challenge and that OAC3745-35-03 was not violative of federal law.

On January 4, 1978, Petitioner filed a Notice of Appeal in the Ohio Supreme Court. On April 7, 1978, the Ohio Supreme Court, *sua sponte,* dismissed Petitioner's appeal for the reason that no substantial constitutional question existed,[10] and on May 5, 1978, Petitioner's Motion for Rehearing was denied by the Ohio Supreme Court.

Independently of these state proceedings, the USEPA promulgated new rules for the control of sulfur dioxide emissions in Ohio.[11] For Petitioner's Lake Shore Plant, these regulations contained emission limitations which are significantly less stringent than Ohio's regulations.[12]

10. Under Rule II, Section 3(B) of the Ohio Supreme Court Rules, the Notice of Appeal is treated as a Motion To Certify. When appellant (Petitioner herein) claims that the case involves a constitutional question, the Ohio Supreme Court will, *sua sponte,* consider the case as on a motion to dismiss the appeal as one not involving any substantial constitutional question, at the same time it considers the Motion to Certify.

11. After the Sixth Circuit in *Buckeye I, supra,* vacated USEPA's approval of Ohio's sulfur dioxide plan, the Governor of Ohio, on August 27, 1973, withdrew the sulfur dioxide plan from consideration for federal approval. This prompted USEPA to develop its own sulfur dioxide plan for Ohio pursuant to Section 110(c) of the Clean Air Act.

12. 40 C.F.R. §52.1881(b)(23)(iv) (1977), for example, would allow emissions from Lake Shore boilers 91 through 94 at levels nearly double those permitted under Ohio's regulations.

As a result, Petitioner now is governed by two sets of differing regulations administered and enforced by independent federal and state agencies. On the one hand, Petitioner must comply with the federally promulgated sulfur dioxide standards. On the other hand, the nearly twice-as-stringent Ohio regulations remain in force, notwithstanding that these regulations are "out of date", according to the Franklin County Court of Appeals, and despite the fact that the Court of Appeals strongly concluded these regulations ". . . should no longer be applicable".[13] This incongruity has occurred because the state courts and agencies below have refused to entertain Petitioner's challenges.

13. Opinion of the Franklin County Court of Appeals, Appendix C at A21.



## REASONS FOR GRANTING THE WRIT

### 1. THE DECISIONS OF THE OHIO SUPREME COURT AND THE FRANKLIN COUNTY COURT OF APPEALS[14] CONFLICT WITH DECISIONS OF THIS COURT AND THE SIXTH CIRCUIT COURT OF APPEALS SINCE THEY EFFECTIVELY HAVE DENIED PETITIONER THE OPPORTUNITY TO CHALLENGE AIR POLLUTION REGULATIONS APPLICABLE TO IT.

### A. The Particulate and Sulfur Dioxide Regulations

In *Buckeye I,* various public utilities filed petitions[15] for review of the action by the Administrator of the USEPA approving Ohio's plans for implementation of ambient air quality standards. The Sixth Circuit vacated the Administrator's approval of these plans and held, in part, that approval by the Administrator without permitting participation by interested parties, including Petitioner, was a violation of the Administrative Procedure Act, 5 U.S.C. §500 *et seq.* (1977).

The Sixth Circuit declined to pass on the challenges to the regulations themselves. According to the Court, the Petitioner's challenges to those regulations were to be permitted in subsequent state proceedings in which the state was seeking to apply the regulations. 481 F.2d at 173. As discussed below, the only such proceedings herein

14. Under this Court's decision in *Tumey v. State of Ohio,* 273 U.S. 510 (1927), this writ of certiorari is properly taken to the Ohio Supreme Court. Since the Ohio Supreme Court did not hear this case on the merits, the decision of the Franklin County Court of Appeals is the highest decision of a state court on the merits of Petitioner's claim.

15. The filing of "petitions" is provided for in 42 U.S.C. §1857-h5(b)(i) (1977), now found in 42 U.S.C. §7607(b)(1) (Supp. 1977).

were the administrative adjudication hearings conducted before the Ohio EPA Hearing Panel.

Thereafter, in *Buckeye Power, Inc. et al. v. EPA*, 525 F.2d 80 (1975) ["*Buckeye II*"], the Sixth Circuit considered the USEPA's reapproval of the particulate regulations, and the electric utilities renewal of their challenges to the regulations.

The Sixth Circuit held that the issues in dispute were not ripe for adjudication:

> Our conclusion is that the disputes which Petitioners seek to have this court resolve are being worked out at the *state* agency level where the EPA statute, as construed by the Supreme Court, clearly contemplates they should be. . . . 525 F.2d at 82. (Emphasis supplied.)
>
> Since the record now before us demonstrates that these processes of adjustment are presently proceeding exactly as, and where the statute contemplated, and that no final resolution as to them has been arrived at, this case is not presently ripe for judicial review. 525 F.2d at 84. (Citations omitted.)

The state proceedings referred to by the Sixth Circuit were the adjudication hearings below in which the Hearing Panel unanimously agreed with Petitioner and recommended revision of Ohio's regulations. See further *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60 (1975).

Finally, in *Union Electric Company v. EPA*, 427 U.S. 246, 96 S. Ct. 2518 (1976), this Court held that an appeal from the federal approval of state adopted air pollution control regulations may not address substantive challenges to the approved state regulations. As stated by this Court:



> Perhaps the most important forum for consideration of claims of economic and technological infeasability is before the state agency formulating the implementation plan. . . Moreover, if the industry is not exempted from, or accommodated by, the original plan, it may obtain a variance. . . Lastly, an industry denied an exemption from the implementation plan, may be able to take its claims of economic or technological infeasibility to state courts. 96 S. Ct. at 2529.

Thus, it is clear that such challenges are to be made at the state level.

In Ohio, however, such a challenge could only have been made by Petitioner in an adjudication hearing pursuant to Chapter 119 of the Ohio Revised Code (Appendix G, *infra*). No other forum existed, since at the time the Ohio Air Pollution Control Board promulgated the rules establishing the ambient air quality standards and emission limitations applicable to Petitioner, an appeal to the judiciary was impossible because of the Ohio Supreme Court's controlling decision in *Fortner v. Thomas*, 22 Ohio St. 2d 13 (1970), *approved and followed, Rankin-Thoman v. Caldwell*, 42 Ohio St. 2d 436 (1975). These two cases unequivocally hold that the Ohio Constitution does not provide Ohio courts with jurisdiction to entertain challenges to administrative actions taken in quasi-legislative (rule-making) proceedings.

Nor was there an administrative appeal available at the time of the Ohio Air Pollution Control Board's promulgation of the regulations establishing the ambient air quality standards or emission limitations, since the EBR was not yet in existence. These regulations were promulgated in January, 1972, but it was not until October 23, 1972, that the Ohio General Assembly enacted Chapter 3745 of the Ohio Revised Code (Appendix G, *infra*), which

created the EBR and posited with it the exclusive and original jurisdiction to consider challenges to the Director's rule-making.[16]

Thus, under Ohio law, such a challenge could only be made at the state level in a proceeding pursuant to Chapter 119 of the Ohio Revised Code—there was no other judicial or administrative procedure available to Petitioner.

The orders of the Ohio Supreme Court in the instant case, however, failed to recognize the significance of the adjudication hearing and have foreclosed Petitioner's last opportunity to challenge the regulations at the state level. Therefore, those decisions and the decision below of the Franklin County Court of Appeals were not in accord with principles established in *Buckeye I, II,* and *Union Electric, supra.* These failures to adhere to those principles justify the grant of certiorari to review the judgments below.

**B. Variance Regulation OAC3745-35-03.**

Before the Franklin County Court of Appeals, Petitioner challenged Ohio EPA regulation OAC3745-35-03 on the grounds, *inter alia,* that the regulation, in effect, negated and repealed the statutory basis for variances. Petitioner demonstrated the manner in which the regulation was patently contrary to, and totally inconsistent with, Section 3704.03(H) of the Ohio Revised Code by demonstrating that the regulation precluded the issuance of variances after April 15, 1977, even though Section 3704.03(H), had no such cut-off date. Petitioner therefore contended that the regulation was unlawful and unreasonable, since

16. Section 3745.04 of the Ohio Revised Code, which vests original and exclusive jurisdiction in the EBR, literally refers to "an action of the director . . ." The actions challenged in the adjudication hearings were the actions of the Air Pollution Control Board in establishing the ambient and emission standards.



it was tantamount to an administrative repeal of a legislative enactment. *State ex rel. Foster v. Evatt,* 144 Ohio St. 65 (1944).

While recognizing that Petitioner's argument "(a)t first blush appears to be valid", the Franklin County Court of Appeals rejected the challenge on the grounds that this Court's decision in *Train v. Natural Resources Defense Council, Inc., supra,* provided justification for the Ohio EPA's variance regulation. That court read *Train* as prohibiting variances which ". . . defer compliance beyond the time established for national enactment. . . ."[17] In so holding, the Court of Appeals blatantly misinterpreted this Court's decision in *Train.*

Indeed, this Court, in *Train,* explicitly and unequivocally held that a state can issue variances from its emission limitations *even beyond the date for attainment of the ambient air quality standards.* This Court further indicated that such variances must be approved by the USEPA if the increased emissions allowed thereby do not jeopardize the attainment and maintenance of the ambient air quality standards. In so ruling, this Court rejected the reasoning of the First, Second, Fifth and Eighth Circuits in various decisions where those courts rejected post-attainment date variance mechanisms.[18] Furthermore, in so holding, this Court specifically upheld USEPA's approval of a Georgia implementation plan containing provisions which would have allowed post-attainment date variances.[19]

17. Appendix C, at A16.

18. *Natural Resources Defense Council, Inc. v. EPA,* 478 F.2d 875 (1st Cir. 1973); *Natural Resources Defense Council, Inc. v. EPA,* 494 F.2d 519 (2d Cir. 1974); *Natural Resources Defense Council, Inc. v. EPA,* 489 F.2d 390 (5th Cir. 1974) and *Natural Resources Defense Council, Inc. v. EPA,* 483 F.2d 690 (8th Cir. 1973).

19. *Ga. Code Ann.* §88-912 (1971).

Furthermore, the holding of the Franklin County Court of Appeals also contravenes the clear holding of this Court in *Union Electric Company v. EPA, supra.* That decision reaffirmed the authority of a state to grant variances after the ambient attainment date had passed. Such variances, according to this Court, could provide relief from economically unreasonable, technically infeasible, or unnecessarily stringent regulations within the framework of the Clean Air Act.

*Train* and *Union Electric* do not provide justification for a variance regulation with a cut-off date of April 15, 1977. The decisions below, therefore, conflict with *Train* and *Union Electric,* thereby justifying the grant of this petition.

**2. FUNDAMENTAL PRINCIPLES OF PROCEDURAL DUE PROCESS GUARANTEED BY THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION REQUIRED THE PROVISION OF AN OPPORTUNITY TO PETITIONER TO CHALLENGE THE PARTICULATE AND SULFUR DIOXODE REGULATIONS IN AN ADJUDICATION HEARING SINCE NO OTHER FORUM EXISTED FOR SUCH A CHALLENGE.**

The effect of the Ohio Supreme Court's rulings in the instant case is to foreclose Petitioner from the only forum available to challenge regulations having an adverse impact on it. This results because the Franklin County Court of Appeals held that the consolidated adjudication proceedings could not properly consider challenges to the regulations establishing Ohio's ambient air and emission limitation standards. Petitioner's due process rights have thus been infringed.



Petitioner will be required to spend millions of dollars to comply with regulations which all parties agreed below are "out of date and should no longer be applicable."[20] Even though they were promulgated nearly seven years ago, the regulations have not yet been, and will never be, subjected to independent review, despite that they continue to be applied to Petitioner's detriment. These regulations, therefore, stand inviolate and beyond scrutiny—a unique status in American jurisprudence.

It has long been recognized by authorities in the field of administrative law that a party with a sufficient interest in a determination of governmental action is entitled to present and cross examine witnesses in an adjudication hearing. See, e.g., K. DAVIS, ADMINISTRATIVE LAW, Section 703 (3d ed. 1972). Certainly, Petitioner, which will have to spend millions of dollars to comply with obsolete regulations, had such an interest and was entitled to challenge those regulations.

It has also long been established that basic principles of constitutional due process guarantee one, who is subject to regulations, an opportunity, at some point in the administrative process, to challenge such regulations. *Yakus v. United States,* 321 U.S. 414 ( ). In *Yakus,* this Court stated as follows:

> The present statute is not open to the objection that Petitioners are compelled to serve the public as in the case of a public utility, or that the only method by which they can test the validity of the regulations promulgated under it is by violating the statute and thus subjecting themselves to the possible imposition of severe and cumulative penalties. 321 U.S. at 437-8. (Citations omitted.)

---

20. Opinion of the Franklin County Court of Appeals, Appendix C at A21.

Petitioner, on the other hand, is in precisely this predicament. It is a public utility and has been put in the position of having to violate the regulations in question, and incurring penalties, before it can challenge the regulations. This Court implied in *Yakus* that it is not only unfair to put someone in this position, but also that it is violative of principles of due process. As stated by this Court in *Goldberg v. Kelly*, 397 U.S. 254 (1970):

> The fundamental requisite of due process of law is the opportunity to be heard. . . The hearing must be at a meaningful time and in a meaningful manner. 397 U.S. at 267. (Citations omitted.)

See further *Getty Oil Company v. Ruckelshaus*, 467 F.2d 349 at 356 (3rd Cir. 1972); *Raper v. Lucy*, 488 F.2d 749 at 753 (1st Cir. 1973).

Petitioner, of course, has the option of spending the millions of dollars necessary to comply with the violated regulations or, as noted above, it can violate the regulations and challenge them in an enforcement proceeding. This Hobson's choice cannot be harmonized with accepted notions of due process.[21] *Abbott Laboratories v. Gardner*, 387 U.S. 136, 153 (1967); *Rheingans v. Clark*, 314 F. Supp 1398 (N.D. Cal. 1968). Certainly, the Constitution entitles Petitioner to pre-enforcement review of these regulations.

---

21. Before the Franklin County Court of Appeals, the Director argued that there was no deprivation of due process since Petitioner could have filed a declaratory judgment action under the doctrine of *Burger Brewing Co. v. Liquor Control Commission*, 34 Ohio St. 2d 93 (1973). This proposition was recently rejected by the Ohio Supreme Court in *State, ex rel. Williams, Director v. Bozarth, Judge, supra*, thereby affirming Petitioner's argument that its only opportunity to challenge the regulations was in the pre-enforcement adjudication hearings. Moreover,

(*Continued on following page*)



## CONCLUSION

The decisions below of the Ohio Supreme Court and the Franklin County Court of Appeals foreclose Petitioner from challenging the particulate and sulfur dioxide regulations in question at the state level. Yet this is precisely where this Court and the Sixth Circuit have held that such challenges must be made.

In addition, the decisions below conflict with this Court's decisions in *Train* and *Union Electric*.

Petitioner has been denied its guaranteed constitutional right of procedural due process of law. The decisions of the Ohio Supreme Court and the Franklin County Court of Appeals have foreclosed Petitioner from any opportunity to challenge outmoded regulations, which will require Petitioner to expend a substantial sum of money if it is to comply with them. Its only other "choice" is to violate the regulations and challenge them in an enforcement proceeding. This Court, however, has said that this is no choice at all, and therefore has said that pre-enforcement review is required.

This case involves important questions of federal constitutional law requiring resolution at this time. Further, the misinterpretation and misapplication of decisions of

---

Footnote continued—

prior decisions of the Director indicated that he viewed the adjudication proceedings as the vehicle to "waive" the strict application of general emission standards to specific sources when it can be shown that such regulations were unreasonable as applied. *Ormet Corporation*, 73-AV-119 (1974) at 38-39; *Armco Steel*, 73-AV-164 (1974).

this Court make it uniquely important that this petition be granted.

Respectfully submitted,

GUREN, MERRITT, SOGG & COHEN
650 Terminal Tower
Cleveland, Ohio 44113

By: MICHAEL L. HARDY
DAVID A. SCHAEFER

and

DONALD H. HAUSER, *General Attorney*
THE CLEVELAND ELECTRIC ILLUMINATING COMPANY
P. O. Box 5000
Cleveland, Ohio 44101
*Counsel for Petitioner*